IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
SEPTEMBER 4, 2008 Session

STEPHANIE CAPPS d/b/a STEPHANIE'S CABARET and SMITH INVESTMENT GROUP, L.P. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Direct Appeal from the Chancery Court for Davidson County
No. 04-3210-IV Richard H. Dinkins, Chancellor

No. M2007-01013-COA-R3-CV - Filed December 31, 2008

This appeal involves a building permit that authorized interior rehabilitation of a building for eventual use as an adult entertainment establishment. A local zoning ordinance prohibits adult entertainment establishments from locating within five hundred feet of a church. The Nashville Union Rescue Mission is located directly across the street from the proposed adult entertainment establishment, and the Mission appealed the issuance of the building permit, claiming that it is a "church" within the meaning of the zoning ordinance. The board of zoning appeals concluded that the building permit was issued in error because the Nashville Union Rescue Mission is a church. The permit was revoked, and the landowner and lessee filed a petition for writ of certiorari in chancery court. The chancery court reversed the zoning board's decision and instructed the zoning board to re-issue the permit for adult entertainment use. We vacate the chancery court's order and reinstate the decision of the zoning board.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Vacated

ALAN E. HIGHERS, P.J.,W.S., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Sue B. Cain, Director of Law; J. Brooks Fox, Elizabeth A. Sanders, Assistant Metropolitan Attorneys, Nashville, TN, for Appellant

Bob Lynch, Jr., Nashville, TN, for Appellee Stephanie Capps, d/b/a Stephanie's Cabaret

George A. Dean, Nashville, TN, for Appellee Smith Investment Group, L.P.

OPINION

I. FACTS & PROCEDURAL HISTORY

Smith Investment Group, L.P., (hereinafter, "SIG") is the owner of property located at 660 Lafayette Street, in Nashville, Tennessee. In September of 2003, SIG leased the property to Stephanie Capps and her husband, David Capps ("the Capps"). The Capps intended to convert the existing building on the property into an adult entertainment establishment to be known as "Stephanie's Cabaret." On July 21, 2004, the Capps received building permit number 2004-06458A from the Department of Codes Administration for the Metropolitan Government of Nashville and Davidson County ("the Codes Department"), which authorized "interior rehab" of the building for "adult entertainment." Construction pursuant to the building permit began in earnest on July 27, 2004.

On July 28, 2004, the Nashville Union Rescue Mission ("the Mission") filed an appeal to the Metropolitan Board of Zoning Appeals ("the BZA"), challenging the decision of the Metropolitan Zoning Administrator, Lon F. West, to issue the permit to the Capps for adult entertainment.[1] Section 17.36.260 of the Metropolitan Code of Laws ("M.C.L.") provided that "no adult entertainment establishment shall be within five hundred feet (measured property line to property line) of any church, school ground, college campus, or park." The Mission is located directly across the street from the proposed location for Stephanie's Cabaret, and the Mission contended that it is a "church" within the meaning of the distance requirement.

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[1] Tennessee Code Annotated section 13-7-206(b) provides, with regard to municipal zoning:

> Appeals to the board of appeals may be taken by any person aggrieved . . . by any grant or refusal of a building permit or other act or decision of the building commissioner of the municipality or other administrative official based in whole or part upon the provisions of this ordinance enacted under this part and part 3 of this chapter.

Tennessee Code Annotated Section 13-7-207 further provides:

> The board of appeals has the power to:
> (1) Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit, decision, or refusal made by the municipal building commissioner or any other administrative official in the carrying out or enforcement of any provision of any ordinance enacted pursuant to this part and part 3 of this chapter;
> . . . .

On July 29, 2004, Mr. West hand delivered a letter to the construction site informing the Capps, SIG, and the construction company of the basis of the Mission's appeal. The letter also stated, in relevant part:

> You are further notified that should the Board of Zoning Appeals decide in favor of the appellant, Permit #2004-06458A will be revoked and the use will not be allowed. Continued work under the permit will be done at your risk.

Nevertheless, the Capps continued with construction.

On September 2, 2004, the BZA held a hearing on the Mission's appeal challenging the Capps' permit, to determine whether the Mission is, in fact, a church. The term "church" is not defined within the zoning ordinances.[2] The definition section of the Metropolitan Code of Laws provides that "[w]here words have not been defined, the definition found in the most current edition of Webster's Unabridged Dictionary shall be used." M.C.L. § 17.04.060. In addition, Mr. West, as the Zoning Administrator, possessed "the right to interpret the definition of [undefined terms]." M.C.L. § 17.04.060. The zoning code provided that "[a]ll provisions, terms, phrases and expressions contained in this zoning code shall be construed in order that the true intent and meaning of the metropolitan county council may be fully carried out." M.C.L. § 17.04.050.

The parties submitted the definition of "church" contained in Webster's Dictionary, which states, "a building set apart for public esp. Christian worship." Mr. West explained that his office (the Codes Department) and the local planning commission had prepared a map displaying all churches, schools, college campuses, parks, and adult entertainment establishments.[3] Mr. West stated that because the term "church" was undefined, he would look to the zoning ordinance's definition of "religious institution" to determine whether an organization was a church. Therefore, an organization was placed on the map as a church if it had obtained a permit as a "religious institution." In addition, he would place an organization on the map if it was listed as a church in the telephone book, or if, based on a visual observation, an organization's building looked like a church from the outside. Mr. West stated that, in his opinion, the Mission did not meet any of his three tests for being placed on the map as a church. Therefore, when the Capps applied for their building permit, Mr. West determined, based on the map, that an adult entertainment establishment was permissible at that location.

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[2] The term "religious institution" is defined as "any structure or site used primarily for religious practices." M.C.L. § 17.04.060. The land use table, M.C.L. § 17.08.030, lists "religious institution" under land uses, but it does not list "church" as a land use.

[3] The parties do not address whether this map was an official zoning map adopted by the Metropolitan Council, or what legal effect, if any, was given to the designations on this map. Regarding the map, Mr. West stated, "we identified – between our department and the planning commission, we identified every church . . . . And we adopted the map, which shows the overlay districts basically. . . . And every time a church opens, we map it."

The Mission submitted various evidence in support of its contention that it is a church. One of the Mission's board members explained that chapel services are held at the Mission 365 days a year, and Christian counseling is offered. In addition, the Mission provides food, shelter, drug and alcohol rehabilitation, and a GED program. The Mission's chapel services are open to the public, but an individual must attend chapel service in order to spend the night at the Mission. The only exception to this requirement is when the temperature at night falls below 34 degrees. The Mission's representative stated that in 2003, there were 142,496 different individuals who attended the Mission's evening chapel services, 2,098 people who rededicated their lives at the Mission, and 820 people who prayed to receive salvation. The Mission employs thirteen ordained ministers.

The Mission submitted its charter of incorporation, recorded in the Secretary of State's office in 1954, stating that the Mission was incorporated "for the purpose of promoting the preaching and spreading of the Gospel of Jesus Christ by public gatherings, by radio, and personal work of all kinds; . . . providing temporary shelter and food for homeless persons, and, through spiritual and material aid, helping in their rehabilitation." The Mission's bylaws stated the purpose of the Mission as "Glorifying Jesus Christ by providing temporary shelter and food for homeless persons, providing spiritual and material aid to people in need, helping in their recovery, and promoting the preaching, teaching and spreading of His Gospel." The Mission's "Mission Statement" read:

> Following God's command to love our neighbor as ourselves the Nashville Rescue Mission seeks to help the hurting of Middle Tennessee by offering food, clothing and shelter to the homeless and recovery programs to those enslaved in life degrading problems. Our goal is to help people know the saving grace of Jesus, and through Him, gain wisdom for living, find fulfillment in life and become a positive part of their community.

The Mission also introduced its application to the Internal Revenue Service for tax-exempt status as a 501(c)(3) organization, which was approved, in which the Mission described itself as "a church." The Mission was also granted tax-exempt status by the Tennessee Department of Revenue, and the Tennessee State Board of Equalization granted the Mission a "religious" property tax exemption. Approximately forty letters were submitted from citizens who considered the Mission to be a church. In addition, approximately 120 individuals had signed a petition which stated, "I attend regularly and consider the Nashville Rescue Mission my church." The Mission also submitted photographs of various Christian crosses displayed on all sides of its building and on its signs stating, "Nashville Rescue Mission." Other photographs showed the chapel inside the Mission, which seats 418 people, and also showed the pulpit.

The architect who applied for the Mission's building permit in 1999 testified that he listed the Mission's use as "transient housing" because of the Mission's dormitory spaces. However, the "purpose" listed on the Mission's building permit stated that renovation would take place "for dormitory, chapel, medical care, counseling and dining for 'Nashville Union Rescue Mission.'" The architect again pointed out that there is no land use classification entitled, "church."

An attorney for the Mission explained that after learning about the Capps' permit and the fact that the Mission was not listed on the map prepared by the Codes Department, the Mission's representatives inquired about being placed on the map. They were told to apply for a use permit as a "religious institution."[4] On July 29, 2004, the day after the Mission filed its appeal challenging the Capps' permit, the Codes Department issued permit number 2004-6745A to the Mission, which authorized "religious meetings activity" at the Mission and classified it as a "religious institution." The permit states, "no new work, use added to existing facility."

The attorneys representing the Capps and SIG also presented arguments and a slideshow at the BZA hearing. They claimed that the Mission did not meet the definition of a "church," and they also argued that equitable estoppel prevented the BZA from revoking the Capps' permit because they had "made substantial construction efforts" in reliance on the permit.

At the conclusion of the hearing, a motion to approve the Mission's appeal was made and seconded, but the BZA's vote was tied three to three. Pursuant to the applicable zoning ordinances, because the vote was tied, the case was automatically rescheduled to be heard at the next BZA meeting on September 16, 2004.[5] At the September 16, 2004 hearing, the BZA voted four to three in favor of overturning the zoning administrator's decision to issue the Capps a permit for adult entertainment. The BZA entered an order providing, in relevant part:

> (3) The Nashville Union Rescue Mission was found to be a church according to the provisions of Section 17.36.020.
> (4) The Nashville Union Rescue Mission was a church at the time a permit was issued to Stephanie's as an adult business.
> (5) Therefore the Board found that the Zoning Administrator erred in the issuance of a permit to Stephanie's due to the spacing requirements in Section 17.36.020 for a church in relationship to an adult business.

M.C.L. section 16.04.120 provides that a permit or approval may be revoked "when it is determined that [the] permit has been issued in error." Mr. West, the Zoning Administrator, wrote a letter to SIG on October 1, 2004, which stated, in part:

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[4] M.C.L. § 17.08.030 authorizes multiple uses for one property, and a "religious institution" is permitted as of right in the zone where the Mission is located.

[5] On September 14, 2004, prior to the BZA's hearing, the Codes Department approved the Capps' permit number 2004-6458A for "final use and occupancy." The letter from the Codes Department regarding the permit stated:

> Through routine inspections and visual observations it has been determined that the work performed substantially complies with the applicable codes and ordinances of the Metropolitan Government of Nashville and Davidson County. Therefore, we have approved it for Final Use and Occupancy. However, granting of the Final Use and Occupancy in no way relieves the contractors of their responsibility for any work performed not in accordance with applicable codes and ordinances.

> As you are aware, the Metropolitan Board of Zoning Appeals through Appeal Case #2004-156 ruled that Permit 2004-06458A issued for this location as an "Adult Entertainment" business was issued in error. In light of this, any permits or other approvals you have in regard to occupying this property for this use are revoked. Should this activity be occurring on the property currently, it is to cease immediately. In the event the activity type of adult entertainment has not begun, this shall serve as notice that should this activity type occur on the property, it will be done illegally.

On November 12, 2004, SIG and Stephanie Capps d/b/a Stephanie's Cabaret filed a petition for writ of certiorari in the Chancery Court of Davidson County, seeking a review of the BZA's decision. They alleged that the BZA acted illegally, arbitrarily, and capriciously in revoking Ms. Capps' permit. In addition, the petitioners alleged that the BZA violated their procedural and substantive due process rights in violation of the United States and Tennessee Constitutions and 42 U.S.C. §§ 1983, 1988. The chancellor, by fiat, directed that the writ issue, requiring the Metropolitan Government of Nashville and Davidson County, acting by and through the Metropolitan Board of Zoning Appeals ("Metro"), to transmit the record to the court for review.

On April 3, 2007, the chancery court entered a "Memorandum Opinion and Order," containing the following findings, in relevant part:

> The Court finds that there was material evidence in support of the BZA's determination that at the time the permit was issued to Petitioners, the Mission carried on activities which constituted a "church." In making this determination, the BZA considered more than the physical structure of the building and considered the activities which were carried on in the building, all of which were authorized by and consistent with its charter and by-laws and none of which are inconsistent with Webster's definition of "church." This was essentially a factual determination that the activities carried on by the Mission are those traditionally associated with the mission of a church.
>
> The Court, however, disagrees with the Board's determination that, prior to receiving the designation as a church, the Mission qualified as a church for purposes of applying M.C.L. 17.36.260. It is the designation of the Mission at the time of Petitioners' application which determined the compatability [sic] of Petitioners' application with the zoning ordinance and the intended use of Petitioners' property was permitted at the time of the application. The Board acted illegally in retroactively applying its determination. The initial issuance of the permit was not in error but was in accordance with the state of affairs then existing.
>
> The BZA also acted illegally and arbitrarily in revoking the permit which had been issued to Petitioners. Petitioners correctly point out that they were entitled to the benefit of T.C.A. § 13-7-208 inasmuch as their use and occupancy permit was issued prior to the determination by the BZA that the mission constituted a church, a determination that operated to invoke the provisions of M.C.L. 17.36.260. As testified by the Zoning Administrator, Petitioners' building permit had been issued because the intended use complied with the existing zoning classification and the property was a permittable location for an adult entertainment venue.

> In addition, Petitioners were entitled to rely upon the building permit issued July 21, 2004 and, in fact, did so rely. The record before the Board showed substantial measures Petitioners had taken in reliance on the issuance of the permit. In doing so they acquired a property right in the permit which could not be revoked under the circumstances presented here. *See Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904 (Tenn. 1940).

(citations to the record and footnote omitted). The chancery court reversed the BZA's revocation of Ms. Capps' permit and remanded the case to the BZA with instructions to issue an appropriate permit to Ms. Capps. Metro timely filed a notice of appeal to this Court.

II. ISSUES PRESENTED

Metro presents the following issues, as we perceive them, for review:

1. Whether material evidence exists in the BZA's administrative record to support its decision to treat the Mission as a "church" for purposes of the 500-foot distance requirement between adult entertainment establishments and churches;
2. Whether the petitioners established a pre-existing, non-conforming use pursuant to Tennessee Code Annotated section 13-7-208; and
3. Whether Ms. Capps acquired "vested rights" in her renovation project.

Additionally, Ms. Capps and SIG present the following issue for review:

4. Whether Metro should have been estopped from revoking the permit.

For the following reasons, we vacate the decision of the chancery court and reinstate the decision of the BZA.

III. STANDARD OF REVIEW

"Deciding whether a particular situation meets the requirements of a zoning ordinance is an administrative function, quasi-judicial in nature." ***City of Brentwood v. Metro. Bd. of Zoning Appeals***, No. M2005-01379-COA-R3-CV, 2007 WL 1890641, at *6 (Tenn. Ct. App. June 28, 2007) *perm. app. denied* (Tenn. Oct. 15, 2007, Oct. 22, 2007) (citations omitted). In this instance, a zoning board's decision involves "applying the facts of the situation before the board to the applicable ordinance or requirement, *i.e.*, enforcing, applying, or executing a law already in existence." ***Id.*** Therefore, the proper method for seeking judicial review of a decision by a local board of zoning appeals is by filing a petition for a common law writ of certiorari. ***Harding Acad. v. Metro. Gov't of Nashville & Davidson County***, 222 S.W.3d 359, 363 (Tenn. 2007) (citing Tenn. Code Ann. §

27-8-101 (2000); *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990)); ***BMC Enters., Inc. v. City of Mt. Juliet***, No. M2007-00795-COA-R3-CV, 2008 WL 836086, at *4 (Tenn. Ct. App. Mar. 27, 2008) *perm. app. denied* (Tenn. Oct. 27, 2008); ***W. Express, Inc. v. Metro. Gov't of Nashville & Davidson County***, No. M2005-00353-COA-R3-CV, 2007 WL 2089744, at *3 (Tenn. Ct. App. July 11, 2007).

The common law writ of certiorari affords quite limited judicial review. ***Lafferty v. City of Winchester***, 46 S.W.3d 752, 758 (Tenn. Ct. App. 2000). "It empowers the courts to determine whether the local zoning board exceeded its jurisdiction; followed an unlawful procedure; acted illegally, arbitrarily, or fraudulently; or acted without material evidence to support its decision." ***Id.*** at 758-59 (citing *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983); *Hoover, Inc. v. Metro. Bd. of Zoning*, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997); *Hemontolor v. Wilson County Bd. of Zoning Appeals*, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994)). "In proceedings involving a common law writ of certiorari, illegal, arbitrary, or fraudulent actions include: 1) the failure to follow the minimum standards of due process; 2) the misrepresentation or misapplication of legal standards; 3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards." ***Harding Acad.***, 222 S.W.3d at 363 (citing *Hoover, Inc. v. Metro. Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996)). However, a reviewing court "may not reweigh the evidence, examine the intrinsic correctness of the decision being reviewed, or substitute [its] judgment for that of the local officials." ***Id.*** (citing *Moore v. Metro. Bd. of Zoning Appeals*, 205 S.W.3d 429, 435 (Tenn. Ct. App. 2006)). "In recognition of the policy that favors permitting the community decision-makers closest to the events to make the decision, the courts refrain from substituting their judgments for the broad discretionary power of the local governmental body." ***Lafferty***, 46 S.W.3d at 758 (citing *McCallen v. City of Memphis*, 786 S.W.2d 633, 641-42 (Tenn. 1990); *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992)). "The meaning of a zoning ordinance and its application to a particular circumstance are, in the first instance, questions for the local officials to decide." ***City of Brentwood***, 2007 WL 1890641, at *7 (quoting *Whittemore*, 835 S.W.2d at 16). The common law writ of certiorari is "simply not a vehicle which allows courts to consider the intrinsic correctness of the conclusions of the administrative decision maker." ***Id.*** at *6.

IV. DISCUSSION

A. Does Material Evidence Support the BZA's Decision?

On appeal, SIG and Ms. Capps argue that the BZA's conclusion that the Mission is a church is not supported by any material evidence. The issue of whether there is sufficient evidence to support a zoning decision is a question of law, which we review de novo with no presumption of correctness. ***BMC Enters., Inc.***, 2008 WL 836086, at *5; ***Demonbreun v. Metro. Bd. of Zoning Appeals***, 206 S.W.3d 42, 46 (Tenn. Ct. App. 2005). "The 'material evidence' standard requires 'such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.'" ***Demonbreun***, 206 S.W.3d at 46 (citing *Pace v. Garbage Disposal Dist.*, 390 S.W.2d 461, 463

(Tenn. Ct. App. 1965)). The BZA's determination must be supported by more than a scintilla or glimmer of evidence; it must be of a substantial, material nature. ***Id.*** As stated above, however, we will not reweigh the evidence or substitute our judgment for that of the BZA. *See* ***Harding Acad.***, 222 S.W.3d at 363.

In this case, we find adequate material evidence to support the BZA's conclusion that the Mission is a church. The applicable definition of "church" was "a building set apart for public esp. Christian worship." The record before the BZA included photographs of the pulpit and large chapel inside the Mission, which seats over 400 people. Chapel services are held at the Mission 365 days a year. In addition, crosses are displayed and engraved on the outside of the building. Although the Mission offers food, shelter, and other rehabilitative services to the public as well, an individual cannot take advantage of some of these services without attending chapel services. There are 13 ordained ministers on staff at the Mission, and 142,496 different individuals attended the Mission's evening chapel services in the year prior to the BZA hearing. Approximately 120 individuals signed a petition which stated, "I attend regularly and consider the Nashville Rescue Mission my church." Also, the Mission's charter of incorporation, bylaws, and other documents were submitted which confirmed the religious nature of the organization. This evidence provides a reasonably sound basis for the BZA's decision.

Next, we must address the BZA's conclusion that "[t]he Nashville Union Rescue Mission was a church at the time a permit was issued to Stephanie's as an adult business." The chancery court's order states:

> The Court finds that there was material evidence in support of the BZA's determination that at the time the permit was issued to Petitioners, the Mission carried on activities which constituted a "church." . . .
>
> The Court, however, disagrees with the Board's determination that, prior to receiving the designation as a church, the Mission qualified as a church for purposes of applying M.C.L. 17.36.260.

We find no support for the chancery court's conclusion that the Mission did not qualify as a "church" for purposes of the zoning ordinance prior to the BZA's decision on appeal.

The relevant zoning ordinance provided that "no adult entertainment establishment shall be within five hundred feet (measured property line to property line) of any church, school ground, college campus, or park." M.C.L. § 17.36.260. The term "church" was not defined or otherwise listed as a type of land use. The Zoning Administrator decided that the Mission did not constitute a church after reviewing permits for "religious institutions," consulting a telephone book, and observing the outside appearance of the building. Thus, he issued a permit to Ms. Capps for adult entertainment directly across the street from the Mission. The BZA was authorized to hear and decide appeals where it was alleged that the Zoning Administrator had erred in his decision. Tenn. Code Ann. § 13-7-207(1); *see also* M.C.L. § 17.40.180 (authorizing the BZA to "hear and decide appeals from any order, requirement, decision or determination made by the zoning administrator

. . . in carrying out the enforcement of this zoning code, whereby it is alleged in writing that the zoning administrator . . . is in error or acted arbitrarily."). Following a hearing, the BZA concluded that the Zoning Administrator "erred in the issuance of a permit to Stephanie's due to the spacing requirements in Section 17.36.020 for a church in relationship to an adult business." The BZA was authorized to consider the Zoning Administrator's decision de novo and to disagree with the Zoning Administrator if it determined that his decision was wrong. ***Robison v. Metro. Gov't of Nashville & Davidson County***, No. 01A01-9105-CH-00178, 1992 WL 205268, at *4 (Tenn. Ct. App. Aug. 26, 1992) (citing *State ex rel. Poteat v. Bowman*, 491 S.W.2d 77, 80 (Tenn. 1973)). Again, the zoning code did not provide any procedure for being designated a "church" or receiving a permit as a "church." The activities carried on at the Mission have remained the same at all relevant times, and the Mission did not suddenly change its character in an attempt to interfere with the Capps' permit. The parties have cited no authority to suggest that the BZA's decision was limited to prospective application, such that the Mission did not or could not constitute a church prior to the BZA appeal. Therefore, we reverse the chancery court's finding that the BZA acted illegally in determining that the Mission was a church, within the meaning of the zoning ordinance, when Ms. Capps applied for the building permit.

B. Did the Petitioners Establish a Pre-existing, Non-conforming Use?

SIG and Ms. Capps also argue that Ms. Capps is entitled to the protection of Tennessee Code Annotated section 13-7-208, which addresses non-conforming uses. The chancery court agreed and held that, based on section 13-7-208, the BZA acted illegally and arbitrarily in revoking the building permit. The statute provides, in relevant part:

> (b)(1) In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

Tenn. Code Ann. § 13-7-208. This is essentially a "grandfather clause," meaning "[a] statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect." ***Custom Land Dev., Inc. v. Town of Coopertown***, 168 S.W.3d 764, 772, n.4 (Tenn. Ct. App. 2004) (quoting *Black's Law Dictionary* 706 (7th ed.1999)). The statute "requires local governments to permit certain types of pre-existing nonconforming uses to continue even if they are inconsistent with the zoning classification of the surrounding property." ***Id.*** (quoting *Lafferty*, 46 S.W.3d at 758). However, the statute must be construed strictly against the party who seeks to come within the grandfather clause exception. ***Outdoor West of Tenn., Inc. v. City of Johnson City***, 39 S.W.3d 131, 135 (Tenn. Ct. App. 2000)

(citing *Teague v. Campbell County*, 920 S.W.2d 219, 221 (Tenn. Ct. App. 1995)). A plaintiff must make two threshold showings before invoking the protection of Tennessee Code Annotated section 13-7-208: "(1) There has been a change in zoning (either adoption of zoning where none existed previously, or an alteration in zoning restrictions), and (2) the use to which they put their land was permitted prior to the zoning change." ***Lamar Adver. of Tenn., Inc. v. City of Knoxville***, 905 S.W.2d 175, 176 (Tenn. Ct. App. 1995) (citing *Rives v. City of Clarksville*, 618 S.W.2d 502 (Tenn. Ct. App. 1981)). Here, the first prong of the test has not been satisfied because there was no change in the zoning code. The BZA simply concluded that the Zoning Administrator had erred in interpreting and applying the existing zoning ordinance. If we were to accept the petitioners' argument that they could establish a pre-existing, non-conforming use simply by receiving their permit from the Zoning Administrator, the BZA could never revoke a permit on appeal. We reject the petitioners' argument and reverse the chancery court's decision regarding this issue.

C. Did the Petitioners Acquire Vested Rights?

Next, we will address whether Ms. Capps acquired a vested interest in the permit, which prevented its revocation. Ms. Capps claims that because she obtained a vested right in her permit, the BZA violated her due process rights by revoking it. With regard to the vested rights argument, the chancery court held:

> Petitioners were entitled to rely upon the building permit issued July 21, 2004 and, in fact, did so rely. The record before the Board showed substantial measures Petitioners had taken in reliance on the issuance of the permit. In doing so they acquired a property right in the permit which could not be revoked under the circumstances presented here. *See Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904 (Tenn. 1940).

In ***Howe Realty Co. v. City of Nashville***, 141 S.W.2d 904, 906 (Tenn. 1940), the Court explained:

> As a general rule, a building permit has none of the elements of a contract and may be changed or entirely revoked, even though based on a valuable consideration, if it becomes necessary so to change or revoke it in the exercise of the police power. Applicant's property is not exempt from the operation of subsequent ordinances and regulations legally enacted by the corporation, as for instance, his property may be subject to an ordinance or regulations extending the fire limits. But when once the proper authorities grant a permit for the erection or alteration of a structure, after applicant has made contracts and incurred liabilities thereon, he acquires a kind of property right on which he is entitled to protection; and under such circumstances it is generally held that the permit cannot be revoked without cause or in the absence of any public necessity for such action.

"To acquire vested rights, the plaintiff had to incur substantial construction costs in good faith reliance on a valid building permit." ***Chickering Ventures, Inc. v. Metro. Gov't of Nashville & Davidson County***, No. 88-184-II, 1988 WL 133527, at *3 (Tenn. Ct. App. M.S. Dec. 16, 1988) (citing *Moore v. Memphis Stone & Gravel Co.*, 339 S.W.2d 29 (Tenn. Ct. App. 1959)).

1. A Valid Permit

"A permit for a use prohibited by a valid zoning ordinance, regulation or restriction is void, and subject to revocation." 8 Eugene McQuillen, *The Law of Municipal Corporations* § 25.153 (3d ed. 2000). "A zoning or building permit or certificate may be revoked or nullified where it was illegally issued, as where it was unauthorized, or violates or does not comply with, or conform to, the zoning laws, or where it was issued under a mistake of fact." 101A C.J.S. *Zoning & Land Planning* § 293 (2005). "The issuance of a building permit results in a vested right only when the permit was legally obtained, is valid in every respect, and was validly issued." 101A C.J.S. *Zoning & Land Planning* § 290 (2005).

In ***Moore v. Memphis Stone & Gravel Co.***, 339 S.W.2d 29, 30 (Tenn. Ct. App. 1959) *perm. app. denied* (Tenn. Apr. 6, 1960), a county building commissioner granted a use and occupancy permit to a gravel company, allowing it to extract sand, gravel, and natural resources on property the company had leased. Neighboring landowners filed suit within a month, claiming that the permit violated the "Five Mile County-City Zoning Ordinance." ***Id.*** at 32. The chancellor found that the gravel company's operations were in violation of the zoning ordinance and issued an injunction against the company. ***Id.*** On appeal, the gravel company argued that it had acquired a vested interest in the permit because it had expended large sums of money in reliance on the permit. ***Id.*** at 32-33. The Court of Appeals found that the building commissioner was not authorized to issue a permit that was inconsistent with the zoning code; therefore, the gravel company could not acquire vested rights in the invalid permit. ***Id.*** at 35.

In ***Chickering Ventures***, a local zoning administrator had issued a building permit to an applicant for the construction of duplexes, but the local planning commission had not approved the lots for duplexes, as required by the zoning ordinance. 1988 WL 133527, at *3. The applicant began construction and spent $17,000 before the local codes department suspended the permit on the ground that it was issued in error. ***Id.*** at *1-2. The Court of Appeals held that the applicant could not acquire vested rights in the building permit because it was not validly issued. ***Id.*** at *3.

In ***Far Tower Sites, LLC v. Knox County***, 126 S.W.3d 52, 53 (Tenn. Ct. App. 2003), an applicant was issued a building permit by the Knox County Codes Office for the purpose of constructing a cellular telecommunications tower. The tower was expressly permitted in the agricultural zone where the applicant had leased property. ***Id.*** at 54. However, the applicant had not obtained a Certificate of Appropriateness ("COA") – a legal prerequisite to the issuance of a building permit – from the Tennessee Technology Corridor Development Authority pursuant to the Tennessee Technology Corridor Development Authority Act. ***Id.*** at 53. The applicant built an access road to the site, prepared the site, subleased the property, and began construction, incurring expenditures and

contractual commitments that totaled one hundred percent of the cost of the project, excluding labor. ***Id.*** at 54-56. When the improper permit was discovered, the applicant claimed that he had acquired vested rights in the permit which prevented its revocation. ***Id.*** at 63. The Court of Appeals found that ***Moore v. Memphis Stone & Gravel Co.*** controlled the issue of "the effect of an invalidly-issued permit," and it held that the applicant "could not and did not obtain a vested property right" in the permit because it was issued in violation of the Act and the Knox County zoning ordinance. ***Id.*** at 66.

Here, the BZA concluded that the Zoning Administrator erred in issuing the permit to Ms. Capps because of the spacing requirements in the zoning ordinance. Thus, Ms. Capps did not possess a valid permit that complied with the applicable zoning ordinances in order to support a vested rights claim.

2. Substantial Construction Costs and Good Faith Reliance

Even if Ms. Capps' permit had been validly issued, we find that she did not expend substantial construction costs in good faith reliance on the permit to give rise to vested rights.

"It is well settled that rights under an existing ordinance do not vest until substantial construction or substantial liabilities are incurred relating directly to construction." ***State ex rel. SCA Chem. Waste Servs., Inc. v. Konigsberg***, 636 S.W.2d 430, 437 (Tenn. 1982). In order to obtain a "vested interest," the applicant must have incurred "substantial actual construction costs." ***Jones v. City of Milan Bd. of Zoning Appeals***, 1985 WL 4309, at *2 (Tenn. Ct. App. W.S. Dec. 9, 1985) *perm. app. denied* (Tenn. Mar. 24, 1986). "Pre-construction or planning costs do not meet the criteria." ***Id.*** (citing *Konigsberg*, 636 S.W.2d at 437; *Schneider vs. Lazarov*, 390 S.W.2d 197, 201 (Tenn. 1965); *Howe Realty Co.*, 141 S.W.2d at 906-07). In ***Jones***, for example, this Court refused to consider, for the purpose of vested rights, the amount of money the applicant spent in preparation for building apartments on "an option to purchase the land in question" and "substantial expenses such as architectural fees in preparation for the application and in contemplation of building." ***Id.*** at *2.

Ms. Capps points to her expenditures related to demolishing the inside of the building, surveying the property, and architectural planning. However, she acknowledges that these expenses were incurred prior to the issuance of the building permit. Clearly, these expenses were not incurred in reliance on the building permit. We consider these to be "[p]re-construction or planning costs," which, according to ***Jones***, "do not meet the criteria." 1985 WL 4309, at *2. Ms. Capps also asks us to consider the amount of her lease obligation, but she entered into the lease in September of 2003, ten months before she obtained the building permit on July 21, 2004. Again, these costs were not incurred in reliance on the building permit. In ***Westchester Co., LLC v. Metro. Gov't of Nashville & Davidson County***, No. M2004-02391-COA-R3-CV, 2005 WL 3487804, at *1 (Tenn.

Ct. App. Dec. 20, 2005), a plaintiff purchased property that was zoned to allow multi-family housing and contracted to re-sell the property to a third party for multi-family town houses. The property was then re-zoned to single family. ***Id.*** The plaintiff claimed vested rights, asking the Court to consider the purchase price he paid for the property and his potential contract liability. ***Id.*** at *4. The Court explained that these expenditures and liabilities did not give rise to vested rights:

> It is clear that the liability incurred must be, literally, directly related to construction. See *Pep Props. v. Town of Farragut*, 1991 WL 50211, at *2 (Tenn. Ct. App. E.S., filed April 10, 1991), *perm. app. denied*, September 9, 1991 (holding that $13,000.00 in "preliminary expenses" did not qualify as "'substantial liabilities' within the purview of the requirement"). Westchester's lost profits and potential liability on the contract to sell the property are not liabilities incurred in relation to construction. They are more appropriately labeled as losses/liabilities incurred in relation to the holding of investment property. . . . We see no justification for the expansion of the well-defined concept of the activities required to permit the vesting of rights in a zoning classification. The purchase of property does not carry with it a guarantee that the zoning will not be changed.

Id. This same reasoning applies to Ms. Capps' argument regarding the amount of her obligation under the lease.

The parties agree that construction began "in earnest," pursuant to the building permit, on July 27, 2004. The Mission filed its appeal challenging the permit on July 28, and Mr. West hand-delivered a letter to the construction site on July 29, informing Ms. Capps, SIG, and the construction company of the basis of the Mission's appeal. The letter also informed them that if the BZA decided the appeal in favor of the Mission, their permit would be revoked and the proposed use would not be allowed. The letter stated, "Continued work under the permit will be done at your risk."

Ms. Capps does not point to any expenses she incurred between July 21, 2004, when she received the permit, and July 29, when Mr. West notified her of the appeal. The construction company billed Ms. Capps $8,285 for the entire month of July 2004. Thus, we conclude that the maximum cost incurred by Ms. Capps in good faith reliance on the permit was $8,285. In ***Chickering Ventures***, 1988 WL 133527, at *3, the applicant received a building permit for duplexes, then spent $17,000 clearing the lot and pouring concrete footings. The building permit was suspended when the Codes Department discovered it was issued in error. ***Id.*** at *2. The applicant claimed vested rights, but the Court of Appeals concluded that $17,000 in costs was "not substantial enough" to give the applicant a vested right to continue construction. ***Id.*** at *3. The Court relied on ***Haymon v. City of Chattanooga***, 513 S.W.2d 185, 187 (Tenn. Ct. App. 1973), where the expenditure of $35,000 in constructing a foundation for an apartment building was held insufficient to give the property owner a vested right to continue construction. Considering these cases, we conclude that $8,285 in construction costs did not constitute "substantial actual construction costs" giving rise to vested rights. *See* ***Jones***, 1985 WL 4309, at *2.

It is undisputed that Ms. Capps continued working on the building after Mr. West informed her of the Mission's appeal, and Ms. Capps claims that she eventually spent a total of $382,000 in fully converting the building to an adult entertainment establishment. She claims that all of this amount was expended "in good faith reliance" on the building permit. We disagree. Ms. Capps was aware that her permit was being challenged and subject to revocation. "If the city or the neighbors take an appeal alleging invalidity of the permit or the underlying law on which it is based, expenses incurred during appeal will not be in good faith." Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning & Dev. Regulation Law* § 5.28 (2003); *see also* 101A C.J.S. *Zoning & Land Planning* § 290 (2005) ("Actions taken in reliance on a variance or permit while the time for appeal is pending are inherently unreasonable, and if a landowner elects to proceed with construction, knowing full well that upon direct judicial review a presumptively valid building permit may be invalidated and a presumptively vested right may be divested, that landowner proceeds at his or her own risk."); *see also* 101A C.J.S. *Zoning & Land Planning* § 291 (2005) ("A building permit holder's alleged reliance on a permit during the time allowed for appeal to the zoning board does not prevent the board from revoking such permit, upon a timely appeal, if the permit violates a zoning ordinance.").

In sum, we find that Ms. Capps did not acquire a property interest or vested rights in her permit, as she did not incur substantial construction costs in good faith reliance on a valid building permit. The chancery court's ruling to the contrary is reversed.

Finally, Ms. Capps argued that she acquired a vested right in her permit pursuant to M.C.L. § 17.04.030, which provides, in relevant part, "Any permit issued before the effective date of this zoning code or subsequent amendment shall remain in effect provided that construction is begun within six months from the date of issuance of the permit." We reject Ms. Capps' argument because she did not acquire her permit prior to the effective date of the zoning code or a subsequent amendment to the zoning code.

D. Does Equitable Estoppel Apply?

The petitioners also argued that equitable estoppel prevented Metro from revoking their permit because they relied on statements of various employees of the Codes Department to the effect that the Mission was not a church.

"The rule in this State is that the doctrine of estoppel generally does not apply to the acts of public officials or public agencies." ***Bledsoe County v. McReynolds***, 703 S.W.2d 123, 124 (Tenn. 1985). *See also* ***Far Tower Sites***, 126 S.W.3d at 69; ***Haymon***, 513 S.W.2d at 189. "[V]ery exceptional circumstances are required to invoke the doctrine against the State and its governmental subdivisions." ***Bledsoe County***, 703 S.W.2d at 124. "On the rare occasions estoppel has been applied against a municipality, there were exceptional circumstances – 'the public body took affirmative action that clearly induced a private party to act to his or her detriment . . . .'" ***Amos v. Metro. Gov't of Nashville & Davidson County***, 259 S.W.3d 705, 709, n.5 (Tenn. 2008).

> In some cases, if the City does an act that does not comply with the law controlling the manner in which it is to be done, the city will be estopped from denying the validity of its act for equitable considerations arising on the facts of the particular case, usually because the city has accepted the benefits of an act it induced another to perform, or because the city induced a detrimental act of another, ...

Far Tower Sites, 126 S.W.3d at 67 (quoting *City of Lebanon v. Baird*, 756 S.W.2d 236 (Tenn. 1988)).

Courts have refused to recognize estoppel in favor of "one who expends money or creates liability in reliance upon oral statements of administrative officials."[6] *See, e.g.*, ***Westchester Co., LLC v. Metro. Gov't of Nashville & Davidson County***, No. M2004-02391-COA-R3-CV, 2005 WL 3487804, at *4 (Tenn. Ct. App. Dec. 20, 2005) (rejecting an estoppel argument where the applicant was "advised by Metro employees 'that the property was properly zoned, that the property could be developed as residential multi-use property, and that no mistakes concerning the zoning of the property had been made by Metro.'"); ***Corlew's Auto Salvage, Inc. v. Murfreesboro Bd. of Zoning Appeals***, No. 89-38-II, 1989 WL 54913, at *7 (Tenn. Ct. App. May 24, 1989). In ***Far Tower Sites***, the Court rejected the notion that an applicant obtains vested rights by relying upon an "inquiry of the proper officials," explaining:

> It is certainly conceivable that such an official might not be well-versed in the legal intricacies of a thick zoning ordinance. It goes without saying that such officials are of varying levels of education, training, intelligence, competence, and, most importantly, knowledge and comprehension of the law pertaining to their official duties.

126 S.W.3d at 66.

In this case, we do not find those "very exceptional circumstances" necessary to justify invoking equitable estoppel against Metro.

E. Were the Petitioners denied Due Process?

Finally, Ms. Capps argues that she was "denied procedural due process" because she was not afforded a meaningful hearing before the BZA regarding whether she had acquired vested rights in her permit.

> "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In determining what process is due in a particular

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[6] Courts are reluctant to leave the public unprotected due to an error by a governmental official. Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning & Dev. Regulation Law* § 5.29 (2003).

> situation, three factors must be considered: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Moreover, the component parts of the process are designed to reach a substantively correct result. Elaborate procedures at one stage may compensate for deficiencies at other stages. *Bignall* [*v. North Idaho College*, 538 F.2d 243, 246 (9th Cir.1976).]

Phillips v. State Bd. of Regents of State Univ. and Cmty. Coll. Sys. of State of Tenn., 863 S.W.2d 45, 50 (Tenn. 1993) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)).

In ***Jones v. City of Milan Bd. of Zoning Appeals***, 1985 WL 4309, at *2 (Tenn. Ct. App. W.S. Dec. 9, 1985) *perm. app. denied* (Tenn. Mar. 24, 1986), this Court concluded that an issue regarding vested rights is for a court to decide, not a zoning board. If a petition for writ of certiorari is filed, the chancery court should admit evidence regarding the issue of vested rights in order to determine whether the zoning board acted illegally with regard to the permit. ***Id.***

Here, Ms. Capps submitted evidence of her expenditures regarding the vested rights issue in the chancery court, and that evidence is included in the record before us. We find that this procedure did not deprive Ms. Capps of due process.

V. CONCLUSION

For the aforementioned reasons, we conclude that the BZA did not exceed its jurisdiction; follow an unlawful procedure; act illegally, arbitrarily, or fraudulently; or act without material evidence to support its decision. Therefore, we find that the chancery court erred in reversing the BZA's decision. We vacate the order of the chancery court and reinstate the decision of the BZA. Costs of this appeal are taxed equally to Stephanie Capps d/b/a Stephanie's Cabaret and Smith Investment Group, L.P., for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.